

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROSE ADANMA DURU,

Plaintiff,

V.

KAREN MITCHELL, ET AL.,

Defendants.

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No. 3:16-cv-3546-D

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE**

In this *pro se* action, Plaintiff Rose Adanma Duru moves for default judgment against multiple non-appearing defendants. *See* Dkt. No. 37. United States District Judge Sidney A. Fitzwater referred the motion to the undersigned United States magistrate judge for recommendation under 28 U.S.C. § 636(b)(1)(B). *See* Dkt. No. 38. The undersigned enters these findings of fact, conclusions of law, and recommendation that the Court deny the motion.

Applicable Background, Legal Standards and Analysis

Duru has established a record of filing frivolous actions in this Court and elsewhere – for example, this action was initiated in the Houston Division of the Southern District of Texas. *Cf. Duru v. DOJ*, No. 3:16-cv-1162-M-BK, 2016 WL 3223628, at *1 (N.D. Tex. June 9, 2016) (“Plaintiff is warned that, if she persists in filing frivolous or baseless actions, or cases over which the Court lacks subject matter jurisdiction, the Court may impose monetary sanctions and/or bar her from bringing

any further action.” (emphasis omitted)).

A party is entitled to entry of a default by the clerk of the court if the opposing party fails to plead or otherwise defend as required by law. *See* FED. R. CIV. P. 55(a). “This first step, entry of default, is a ministerial matter performed by the clerk and is a prerequisite to a later default judgment.” *Am. S. Ins. Co. v. Buckley*, No. 1:09-CV-723, 2010 WL 5654105, at *3 (E.D. Tex. Dec. 28, 2010), *rec. adopted*, 2011 WL 288604 (E.D. Tex. Jan. 27, 2011).

Rule 55 (b)(2) of the Federal Rules of Civil Procedure governs applications to the Court for default judgment. *See* FED. R. CIV. P. 55(b)(2). A default judgment is available as long as the plaintiff establishes: (1) defendant has been served with the summons and complaint and default was entered for its failure to appear; (2) defendant is neither a minor nor an incompetent person; (3) defendant is not in military service or not otherwise subject to the Soldiers and Sailors Relief Act of 1940; and (4) if defendant has appeared in the action, that defendant was provided with notice of the application for default judgment at least three days prior to the hearing. *See, e.g.*, 50 App. U.S.C. § 521; FED. R. CIV. P. 55; *Twentieth Century Fox Film Corp. v. Streeter*, 438 F. Supp. 2d 1065, 1070 (D. Ariz. 2006).

In the Fifth Circuit, three steps are required to obtain a default judgment: (1) default by the defendant; (2) entry of default by the Clerk’s office; and (3) entry of a default judgment by the district court. *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 141 (5th Cir. 1996). A default occurs when a defendant has failed to plead or otherwise respond to the complaint within the time required by the Federal Rules of Civil Procedure. *Id.* The clerk will enter default when default is established by an affidavit or otherwise. *Id.* After the clerk’s entry of default, a plaintiff may apply to the district court for a judgment based on such default. *Id.*

The [United States Court of Appeals for the] Fifth Circuit favors resolving cases on their merits and generally disfavors default judgments. *Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933, 936 (5th Cir. 1999); *see also Sun Bank of Ocala v. Pelican Homestead & Sav. Ass’n*, 874 F.2d 274, 276 (5th Cir. 1989) (“Default judgments are a drastic remedy, not favored by the federal rules and resorted to by the courts only in extreme

situations.”). This policy, however, is “counterbalanced by considerations of social goals, justice, and expediency, a weighing process [that] lies largely within the domain of the trial judge’s discretion.” *Rogers*, 167 F.3d at 936 (quoting *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990) (internal quotations omitted)); *see also Merrill Lynch Mortg. Corp. v. Narayan*, 908 F.2d 246, 253 (7th Cir. 1990) (noting that default judgments allow courts to manage their dockets “efficiently and effectively”).

When making a determination as to whether or not to enter a default judgment, district courts are to consider the following factors: (1) whether material issues of fact are at issue; (2) whether there has been substantial prejudice; (3) whether grounds for default are clearly established; (4) whether default was caused by good faith mistake or excusable neglect; (5) harshness of default judgment; and (6) whether the court would feel obligated to set aside a default on the defendant’s motion. *Lindsey v. Prive Corp.*, 161 F.3d 886, 893 (5th Cir. 1998). Any doubt as to whether to enter or set aside a default judgment must be resolved in favor of the defaulting party. *See id.*

Arch Ins. Co. v. WM Masters & Assocs., Inc., No. 3:12-cv-2092-M, 2013 WL 145502, at *2-*3 (N.D. Tex. Jan. 14, 2013).

Entry of default judgment is completely within the Court’s discretion. *See Lindsey*, 161 F.3d at 893. And the Court appropriately enters default judgment when a defendant fails to answer or otherwise refuses to obey court orders. *See Bonanza Int’l, Inc. v. Corceller*, 480 F.2d 613, 614 (5th Cir. 1973); *see also McGrady v. D’Andrea Elec., Inc.*, 434 F.2d 1000, 1001 (5th Cir. 1970).

To begin, Duru has neither requested nor obtained entry of default against any defendant. Alone, this failure to obtain the foundation upon which default judgment is built requires that the Court deny her motion. *Cf. Lewis v. Morehouse Det. Ctr.*, Civ. A. No. 09-0332, 2010 WL 2360720, at *1 (W.D. La. Apr. 30, 2010) (“Having set aside the Clerk’s entry of default against the individual defendants, plaintiff now lacks the

requisite foundation for a default judgment against them.”), *rec. adopted*, 2010 WL 2360669 (W.D. La. June 9, 2010).

Further, as stated above, even before the Clerk takes the first step to initiate the default judgment process under Rule 55, a defendant must properly be served with a summons and the complaint. *See Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933, 937 (5th Cir. 1999) (“[A] defendant can not make an appearance for purposes of Rule 55(b)(2) until after the plaintiff effects service and the defendant becomes susceptible to default.”). And, “[u]ntil [a defendant] is *properly* served,” the plaintiff “cannot obtain a default judgment.” *Thompson v. Johnson*, 348 F. App’x 919, 923 (5th Cir. 2009) (per curiam) (citations omitted and emphasis added); *see, e.g., Richardson v. Avery*, No. 3:16-cv-2631-M-BH, 2016 WL 7803155, at *2 (N.D. Tex. Dec. 22, 2016) (“The docket does not reflect that compliance with the requirements of Rule 4 for service of process. Until he has been properly served, ‘the defendant has no duty to answer the complaint and the plaintiff cannot obtain a default judgment.’ Absent proper service of process, a court lacks personal jurisdiction over the defendant, and any default judgment against the defendant would be void.” (quoting *Rogers*, 167 F.3d at 937; citations and footnote omitted)), *rec. accepted*, 2017 WL 213056 (N.D. Tex. Jan. 17, 2017).

Duru includes with her motion certified mail receipts and returns as to many of the defendants she seeks default judgment against – all individuals and corporations, partnerships, or associations. *See generally* Dkt. No. 37. The use of certified mail for service on these defendants implies that Duru attempted to perfect

service under Texas law, *see, e.g.*, FED. R. CIV. P. 4(e)(1); FED. R. CIV. P. 4(h)(1)(A), which provides for service by registered or certified mail, with return receipt requested, *compare Gilliam v. Cty. of Tarrant*, 94 Fed. App'x 230, 230 (5th Cir. 2004) (per curiam) (“the use of certified mail is not sufficient to constitute ‘delivering’ under Rule 4” (citing *Peters v. United States*, 9 F.3d 344, 345 (5th Cir. 1993))), *with* TEX. R. CIV. P. 106(a)(2) (“Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by Rule 103 by mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.”); *see also Cross v. Grand Prairie*, No. 3:96-cv-446-P, 1998 WL 133143, at *6 (N.D. Tex. Mar. 17, 1998) (“Although Rule 4(e)(1) authorizes service pursuant to Texas law, absent prior authorization by the trial court, the only methods of service permitted in Texas are service in person or by registered mail.” (citing TEX. R. CIV. P. 106(a))).

As to persons authorized to serve process under Texas law, Texas Rule of Civil Procedure 103 provides “that a sheriff, a constable, or any person authorized by law or by written order of the court not less than 18 years of age may serve any process, ‘[b]ut *no person who is a party* to or interested in the outcome of the suit may serve any process in that suit.’” *Blanton-Bey v. Carrell*, No. H-09-3697, 2010 WL 1337740, at *2 (S.D. Tex. Mar. 26, 2010) (quoting TEX. R. CIV. P. 103; emphasis added by the court in *Blanton-Bey*); *see also Lucky v. Haynes*, No. 3:12-cv-2609-B, 2013 WL 3054032, at *2 (N.D. Tex. June 18, 2013) (“Upon amendment of the relevant [Texas] rules, federal district courts in Texas interpreting Texas Rule 103 have found that the clerk of the

court or one of the three authorized persons in Rule 103 can serve process by certified mail.” (citations omitted)).

In addition, Texas law requires that particular information be included in the return of service, including the address served and the date of service or attempted service, *see* TEX. R. CIV. P. 107(b), and “when certified mail has been selected as the method of service, Texas law further requires that the return receipt be signed by the addressee,” *Lucky*, 2013 WL 3054032, at *3 (citing TEX. R. CIV. P. 107(c); *Keeton v. Carrasco*, 53 S.W.3d 13, 19 (Tex. App. – San Antonio 2001, pet. denied)).

The evidence included with the motion for default judgment does not reflect that service was proper under Texas law as to any defendant. In particular, there is no evidence that service was attempted by an authorized person. This deficiency means that these defendants have not made “an appearance for purposes of Rule 55(b)(2)” and are currently not “susceptible to default.” *Rogers*, 167 F.3d at 937. The motion for default judgment also should be denied for this reason.

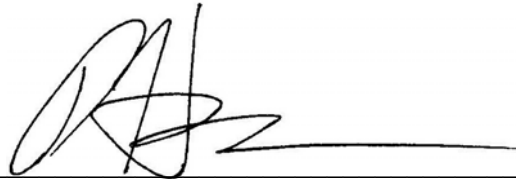
Recommendation

The Court should deny Plaintiff Rose Adanma Duru’s motion for default judgment [Dkt. No. 37].

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or

recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: January 29, 2018

A handwritten signature in black ink, appearing to read 'D. Horan', with a long horizontal line extending to the right.

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE